SPECIFIC PERFORMANCE FOR AND AGAINST STRANGERS TO THE CONTRACT.

GIVEN a contract which, from its nature, warrants a decree for its specific performance by the promisor at the suit of the promisee, under what circumstances may its performance be compelled either by persons other than the promisee, or against persons other than the promisor?

The typical agreement justifying the relief of specific performance is the agreement for the sale and purchase of land. It is often said that such an agreement makes the seller a trustee for the buyer. But the relation between these parties is quite different from the ordinary trust relation. The seller retains the legal title as a security for the payment of the purchase-money. Subject to this incumbrance and to the reservation of rents and profits up to the time fixed for conveyance, in case the seller keeps possession also, the equitable interest is in the buyer. In other words the real relation of the buyer and seller is analogous to that of a mortgagor and mortgagee in a mortgage created, as in the modern English practice, by an absolute conveyance on the part of the mortgagor, and an agreement to reconvey, on payment of the loan, on the part of the mortgagee. The reports are full of statements to this effect.[1] One of the most pointed is Judge Turley's remark in Graham *v.* McCampbell:[2] "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt." It goes without saying that a mortgagor, or his assignee, may redeem the land and compel a reconveyance from any grantee of the mortgagee, unless the title has vested in a purchaser for value without notice of the mortgage, and that any assignee of the mortgagor has the same right. In like manner the buyer or any assignee, immediate or remote, of the buyer's rights may redeem the land and compel a conveyance from the seller, or from any assignee of the land, except a purchaser for value without notice of the vendor's promise, or one claiming under such a purchaser.

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[1] See 1 Ames, Cas. in Eq. Jur. 240 *n.*

[2] Meigs, 52, 55.

The soundness of the analogy to the mortgage is the more evident, if one considers the right to compel performance of the buyer's promise. As the mortgagee, or his assignee, may maintain a bill against the mortgagor for the payment of the mortgage debt, or for the alternative relief of foreclosure of the mortgage, and a decree for the payment of any deficiency between the debt and the value of the land, so the vendor, or his assignee, may maintain a bill against the buyer for the payment of the purchase money, or for the alternative relief of foreclosure of the buyer's equity and a decree for the payment of any deficiency between the contract price and the value of the land.[1] Similarly, as no decree will be given against an assignee of the mortgagor for the payment of the whole or any part of the mortgage debt, so no decree can be had against the assignee of the buyer for the whole or any part of the purchase money. The sole remedy against an assignee of the mortgagor is the foreclosure of the mortgage, and the sole remedy against an assignee of the buyer is the foreclosure of his equity to call for a conveyance.[2]

If it be asked why the assignee of the mortgagee or vendor must convey, although he has made no promise to convey, while the assignee of the mortgagor or buyer need not pay, because he has made no promise to pay, the answer is simple. The assignee of the mortgagee or seller, having notice of his grantor's agreement to convey, would naturally pay him only the value of the incumbrance. If he were permitted to repudiate his grantor's agreement he would retain for himself a *res*, which, obviously, should go to the mortgagor or buyer upon payment of the incumbrance. To prevent this unconscionable enrichment of one person at the expense of another, equity, upon the plainest principles of justice, imposes upon the assignee a constructive duty to convey, coextensive with the express undertaking of his grantor.

But this reasoning is wholly inapplicable to the assignee of the mortgagor or buyer. He receives no *res* which should go to the mortgagee or seller, and he makes no unjust benefit at their expense by not paying the mortgage debt or purchase money.

Besides the agreement to transfer property there are some other affirmative agreements touching a particular *res*, of which equity will compel specific performance. A grantor, for instance, may

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[1] Lysaght *v.* Edwards, 2 Ch. D. 499, 506, per Jessel, M. R.

[2] Comstock *v.* Hitt, 37 Ill. 542 and cases cited in 1 Ames, Cas. Eq. Jur. 141, *n.* 2.

require the grantee of land to build thereon, in fulfilment of his promise given as a part of the consideration for the conveyance.[1] But the rights and duties of third persons, growing out of such a promise are widely different from those of assignees of promisors in promises to convey property. The promise to build being made, as a rule, to the promisee, not as an individual, but as an occupant of land in the neighborhood, the benefit of the promise is not transferable generally to such person as the promisee may designate, but only to some subsequent occupant of the promisee's land.[2] Nor is the burden of such a promise transferable to any one, even to a purchaser from the promisor with notice of the promise.[3]

Such purchaser, by refusing to build, does not retain for himself any *res* which ought to go to the promisee. His only benefit is the avoidance of a possibly unprofitable expenditure of money. Nor does this benefit to him imply an unjust pecuniary loss to the promisee. For the latter still has his right to compensation for the promisor's breach of contract. If the promisor is solvent, the promisee will lose nothing; and even if the promisor is insolvent, the promisee's loss, like that of the other creditors, is simply the consequence of misplaced confidence in the pecuniary ability of the common debtor. Moreover, it is precisely the same loss that would have befallen him if the promisor had kept the land. So long as this is true, there is obviously no reason why equity should impose upon the promisor's assignee the constructive duty of fulfilling the latter's promise, and thereby shift the loss from the promisee, who willingly took the risk of the promisor's solvency, to the assignee, who gave no credit.

If we turn now to negative agreements restricting the use of property, we shall find that the cases in which equity will grant

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[1] Storer *v.* Gt. West. Co., 2 Y. & C. C. C. 48; Mayor *v.* Emmons, [1901] 1 K. B. 515, and cases cited in 1 Ames, Cas. Eq. Jur. 78, *n.* 1.

[2] Doubtless in some cases the benefit of the promise is not assignable at all, being intended to enure to the advantage of the promisee alone or to the good of the public. Austenberry *v.* Corporation, 29 Ch. Div. 750.

[3] Haywood *v.* Brunswick Society, 8 Q. B. Div. 403; London Co. *v.* Gomm, 20 Ch. Div. 562, 583 (*semble*); Andrew *v.* Aitken, 22 Ch. D. 218 (*semble*); Austenberry *v.* Corporation, 29 Ch. Div. 750 (overruling Cooke *v.* Chilcott, 3 Ch. D. 694 (invalidating Holmes *v.* Buckley, 1 Eq. Ab. 27, and explaining Morland *v.* Cook, 6 Eq. 252); Hall *v.* Ewin, 37 Ch. Div. 74; Clegg *v.* Hands, 44 Ch. D. 503, 519.

But see Gilmer *v.* Mobile Co., 79 Ala. 569; Whittenton *v.* Staples, 164 Mass. 319; Countryman *v.* Deck, 13 Abb. N. C. 110; R. R. Co. *v.* R. R. Co., 171 Pa. 284; Lydick *v.* Baltimore Co., 17 W. Va. 427.

its relief by specific performance in favor of or against strangers to the contract, fall into two classes. The first includes covenants that run at law with the land or the reversion, in which cases the equitable relief is concurrent with the legal remedy. The second includes agreements, whether under seal or by parol, enforceable at law only by and against the immediate parties, in which cases, therefore, the jurisdiction of equity in favor of or against third persons is exclusive.

The rule as to the first class of cases is simple and uniformly recognized. If, from the nature of the covenant, the covenantee has the option of proceeding at law for damages or in equity for specific performance by means of an injunction, this same option may be exercised by any third person entitled to sue, and against any third person liable to be sued at common law.[1]

In the second class of cases there is not complete harmony in the decisions; nor in the courts, which agree in their decisions, is there a consensus of opinion as to the *ratio decidendi*. It will be convenient first to state the result of these decisions as to the persons subject to the burden of these agreements; as to the persons entitled to the benefit of them; as to the nature of the restrictions, of which the benefit and the burden pass to third persons; and as to the kind of *res*, to which such restrictions attach; and then to discuss the general principle to be deduced from the decisions.

To maintain a common law action upon covenants running with the land at law privity of estate between the covenantor and the defendant, is essential. But no such privity is necessary in suits against persons chargeable only in equity. The burden of the restrictive agreement, unless expressly limited to the covenantor,[2] falls upon every possessor of the *res* except a purchaser for value without notice of the agreement, or a possessor subsequent to such *bona fide* purchaser. Accordingly relief by injunction will be granted not only against the covenantor's assignee,[3] but against his lessee,[4] against an occupant,[5] and also, it is believed, although no case in point has been found, against a disseisor.

A purchaser for value without notice of the agreement takes the

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[1] Clegg *v.* Hands, 44 Ch. Div. 503.

[2] *Re* Fawcett, 42 Ch. D. 150.

[3] Tulk *v.* Moxhay, 2 Ph. 774, and cases cited in 1 Ames, Cas. Eq. Jur. 149, *n.* 1.

[4] John Brothers Co. *v.* Holmes, [1900] 1 Ch. 188; Holloway *v.* Hill, [1902] 2 Ch. 612, and cases cited in 1 Ames, Cas. Eq. Jur. 152, *n.* 1.

[5] Mander *v.* Falcke, [1891] 2 Ch. 554.

res free from the restrictive agreement.[1] The promisee and the innocent purchaser are equally meritorious persons, and one of them must suffer by the wrongful conduct of the transferor. But in this instance, as in other cases of equal equities, the court leaves the parties where it finds them. To incumber the *res* in the hands of the innocent purchaser for the benefit of the promisee would be to rob Peter to pay Paul. The situation is altogether different, if the *res* is acquired with notice of the restrictive agreement, or by a volunteer. If such a possessor were permitted to ignore the restrictive agreement, he would make an unmerited profit, and this profit would entail an undeserved loss upon the promisee. For the promisee in negative agreements, unlike the promisee in affirmative agreements, has no redress against the promisor.[2] The latter did not violate the restrictive agreement while he was in possession of the *res*, and its violation by a subsequent possessor is no breach of contract by the promisor.

What persons, if any, other than the promisee may enforce compliance with restrictive agreements, depends wholly upon the intention of the parties to the agreement. Frequently the parties intend that the restriction upon the promisor's land shall be for the benefit of the promisee as owner of neighboring land and of any subsequent possessor of the whole or any part of the promisee's land. This is the case when a tract of land is divided into building lots to be sold under a general scheme by which certain restrictions are to apply to each lot for the benefit of every other lot into whosesoever hands they may come. Privity of estate between the promisee and the plaintiff is not essential to the enforcement of these restrictions. The benefit of the agreement passes not

[1] Carter *v.* Williams, 9 Eq. 678; Nottingham Co. *v.* Butler, 16 Q. B. Div. 778, 787, 788; Rowell *v.* Satchell, [1903] 2 Ch. 212; Washburn *v.* Miller, 117 Mass. 376; Moller *v.* Presbyterian Hospital, 65 N. Y. App. Div. 134, and cases cited in 1 Ames, Cas. Eq. Jur. 173, *n.* 1. There is a casual statement by Jessel, M. R., in London Co. *v.* Gomm, 20 Ch. D. 562, 583, that a *bona fide* purchaser of an equitable estate would take subject to the burden of a restrictive agreement, and this *dictum* has received the extra-judicial approval of Collins, L. J., in Rogers *v.* Hosegood, [1900] 2 Ch. 388, 405, and Farwell, J., in Osborne *v.* Bradley, [1903] 2 Ch. 446, 451. It is difficult, however, to see either the justice or the legal principle upon which the *bona fide* purchaser of an equitable fee-simple should be less entitled to exception from the burden of the restrictive agreement than the innocent purchaser of a legal fee-simple. These *dicta* of the English judges are deservedly criticised in a recent article in the Solicitors' Journal (47 Sol. J. 793).

[2] Clements *v.* Welles, L. R. 1 Eq. 200; Feilden *v.* Slober, 7 Eq. 523; Evans *v.* Davis, 10 Ch. D. 747, 764; Patman *v.* Harland, 17 Ch. D. 353; Hall *v.* Ewin, 37 Ch. D. 74.

only to an assignee,[1] but also to a lessee[2] of the assignor, and probably to a subsequent possessor, who is a mere occupier.[3] Sometimes it is the intention of the parties that the restriction upon the promisor's land shall benefit third parties already in possession of neighboring land at the time of the promise. Accordingly, if the owner of land sells it in lots to different purchasers, but subject to the same restrictions, the prior purchaser of one lot may enforce the restrictive agreement of the later purchaser of another lot.[4] Similarly, a promise of the purchaser of lot 1 from A, a trustee for B, not to erect any building which would obstruct the view from the house on the adjoining lot 2, owned by B in his own right, is enforceable by B.[5]

If the restrictive agreement is intended for the benefit of the promisee alone, by adding to his comfort and enjoyment in the occupancy of his neighboring land, no other possessors can enforce the agreement.[6]

Intermediate between the intention to benefit every possessor in the occupancy of the neighboring land, and the intention to enhance the enjoyment of the promisee's occupancy alone, we find in the much approved judgment of Hall, V. C., in Renals *v.* Cowlishaw[7] the suggestion of still another possible intention, namely, the intention to benefit the promisee, not only as an occupant, but also as a future seller, by giving him the power, if he chooses to exercise it by an actual assignment of the agreement, of transferring the same benefits to any or all of his vendees. In such a case,

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[1] Rogers *v.* Hosegood, [1900] 2 Ch. 388; Nottingham Co. *v.* Butler, 16 Q. B. Div. 778; Parker *v.* Nightingale, 6 All. 341; DeGray *v.* Monmouth Co., 50 N. J. Eq. 329; Tallmadge *v.* East Bank, 26 N. Y. 105, and cases cited in 1 Ames, Cas. Eq. Jur. 172, *n.* 1, 180, *n.* 1.

[2] Taite *v.* Gosling, 11 Ch. D. 273.

[3] Presumably equity would not enforce the restriction at the suit of a disseisor, but would grant an injunction on a bill filed by the disseisee.

[4] Renals *v.* Cowlishaw, 9 Ch. D. 125, 128 (*semble*); Nottingham Co. *v.* Butler, 16 Q. B. Div. 778, 784 (*semble*); Collins *v.* Castle, 36 Ch. D. 243; Hopkins *v.* Smith, 162 Mass. 444; DeGray *v.* Monmouth Co., 50 N. J. Eq. 329, 335; Barrow *v.* Richard, 8 Paige 351; Brouwer *v.* Jones, 23 Barb. 153.

[5] Gilbert *v.* Peteler, 38 N. Y. 165.

[6] Keates *v.* Lyon, 4 Ch. 218; Sheppard *v.* Gilmore, 57 L. J. Ch. 6; Osborne *v.* Bradley, [1903] 2 Ch. 446; Formby *v.* Barker, [1903] 2 Ch. 539; Badger *v.* Boardman, 16 Gray, 559; Sharp *v.* Ropes, 110 Mass. 381; Clapp *v.* Wilder, 176 Mass. 332; Helmsley *v.* Marlborough Co., 62 N. J. Eq. 164, 63 N. J. Eq. 799; Equitable Co. *v.* Brennan, 148 N. Y. 661. See also Kemp *v.* Bird, 5 Ch. Div. 974; Ashby *v.* Wilson, [1900] 1 Ch. 66, in which cases the restrictive agreements of a subsequent lessee of A were unenforceable by a prior lessee of A.

[7] 9 Ch. Div. 125, 11 Ch. Div. 866.

therefore, a subsequent possessor, in order to enforce the restriction, must prove two distinct assignments by the promisee, an assignment of the land and an assignment of the contract.[1] The instances must be rare in which a promisor, willing to give the promisee the power of transferring the benefit of the agreement, would care whether the power were exercised by a double assignment of land and agreement or by the mere assignment of the land. Nor is it easy to see why this distinction should be of value to the promisee. For if the agreement be interpreted in the wider sense as intended to give the benefit to the promisee and any assignee of the land as such, a promisee, wishing under exceptional circumstances to convey the land without the benefit, could easily release the restriction as to the land about to be conveyed. It may be doubted, too, whether in Rènals *v.* Cowlishaw and the other English cases, in which assignees of the land were denied the benefit of the restrictions because there was no actual assignment of the agreement also, the evidence was sufficient to prove any intention to require the double assignment. On very similar facts in several American cases the court decided that the benefit was intended to pass to any assignee of the land.[2]

It might be supposed that all restrictions upon the use of land which are enforceable as between the parties to the agreement would be equally effective in favor of and against third persons, within the rules already stated. In some jurisdictions, however, relief for or against strangers to the agreement is limited to those restrictions which make for greater pleasure or comfort in the occupation of the neighboring land. Agreements of the promisor not to use his land in competition with his neighbor, according to the decisions and *dicta* in a few states, are of value only as between promisor and promisee.[3] But the weight of authority is in favor of the opposite and, as it seems to the writer, the better opinion.[4]

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[1] See, in accordance with this view of Hall, V. C., Master *v.* Hansard, 4 Ch. Div. 718; Nalder *v.* Harman, 82 L. T. Rep. 594; Spicer *v.* Martin, 14 App. Cas. 12, 24; Rogers *v.* Hosegood, [1900] 2 Ch. 388, 408.

[2] Peck *v.* Conway, 119 Mass. 546; Post *v.* West, 115 N. Y. 361; Clark *v.* Martin, 49 Pa. 289; Muzzarelli *v.* Hulshizer, 163 Pa. 643.

[3] Taylor *v.* Owen, 2 Blackf. 301 (*semble*); Norcross *v.* James, 140 Mass. 188; Kettle Ry. *v.* Eastern Ry., 41 Minn. 461 (*semble*); Brewer *v.* Marshall, 19 N. J. Eq. 537 (four of twelve judges dissenting); Tardy *v.* Creasy, 81 Va. 553 (two of five judges dissenting).

[4] Holloway *v.* Hill, [1902] 2 Ch. 612; Robinson *v.* Webb, 68 Ala. 393, 77 Ala. 176; McMahon *v.* Williams, 79 Ala. 288; Frye *v.* Partridge, 82 Ill. 267; Watrous *v.* Allen, 57 Mich. 362; Hodge *v.* Sloan, 107 N. Y. 244 (two judges dissenting); Stines *v.* Dorman, 25 Oh. St. 580; Middletown *v.* Newport Hospital, 16 R. I. 319, 333 (*semble*).

If A may sell his land to B for a larger price because of his agreement not to use land that he retains in competition with B's use of the land purchased, and if this is a valid agreement as between A and B, it seems a highly unjust doctrine that permits A to sell, and C, although a purchaser with notice, to buy the land freed from the restriction, and gives B no remedy against either A or C.

The *res*, to which the benefit and burden of restrictive agreements attach, is commonly land. But it may be personal property. In the familiar case of the sale of a business with an agreement by the seller not to engage in the same business within a certain distance, the benefit of the agreement passes to a subsequent assignee of the business.[1] An instance of the burden of a restriction passing to the assignee of personalty is found in a recent New York case.[2] The owner of the copyright of a book upon the sale of one set of electrotype plates of the book to the plaintiff, agreed not to sell copies of the book printed from another set of plates below a certain price, and this agreement was enforced by an injunction against the defendant, a subsequent purchaser of the copyright with notice of the restriction.

The uncertainty as to the true legal principle of the decisions upon the passing of the benefit and burden of restrictive agreements is evident from the statement by Jessel, M. R., as late as 1882, that the doctrine of Tulk *v.* Moxhay,[3] a leading case on the subject, appeared to him to be "either an extension in equity of Spencer's[4] Case to another line of cases, or else an extension in equity of the doctrine of negative easements."[5] Subsequent judgments in England have made no choice between the alternatives suggested by the Master of the Rolls. On the other hand many American courts have countenanced the supposed analogy between restrictive agreements and negative easements.[6] But the

[1] Benwell *v.* Innes, 24 Beav. 307; Fleckenstein *v.* Fleckenstein (N. J. Eq. 1903), 53 Atl. R. 1043; Francisco *v.* Smith, 143 N. Y. 488, and cases cited in 1 Ames, Cas. Eq. Jur. 187, *n.* 1.

[2] Murphy *v.* Christian Association, 38 N. Y. App. Div. 426. *See* also N. Y. Co. *v.* Hamilton, 28 N. Y. App. Div. 411.

[3] 2 Ph. 774.

[4] 5 Rep. 16.

[5] London Co. *v.* Gomm, 20 Ch. Div. 562, 583.

[6] "The reservation creates an easement, or servitude in the nature of an easement." *Per* Morton, J., in Peck *v.* Conway, 119 Mass. 546. See similar statements in Webb *v.* Robbins, 77 Ala. 176, 183; Hills *v.* Miller, 3 Paige 254; Trustees *v.* Cowen, 4 Paige 510, 515; Trustees *v.* Lynch, 70 N. Y. 440, 446, 447, 448, 449, 450; Wetmore *v.* Bruce, 118 N. Y. 318, 322.

courts of New Jersey have rejected this analogy,[1] and, it is submitted, they were right in so doing. There is, it is true, a certain superficial resemblance between restrictive agreements and negative easements. Two estates are essential to the passing of the benefit and burden of each.[2] But the differences between them are fundamental. An easement is an obligation between two estates. This relation is indicated by the common terms dominant and servient estates. Because the one is obligee and the other obligor, the relation continues the same into whosesover hands one or both estates may successively pass, and, except for Registry Acts, whether the subsequent owners bought with or without notice. This cannot be said of restrictive agreements. The burden vanishes as soon as the land subject to the restriction comes to the hands of a purchaser for value without notice of the restriction. Moreover the burden by the intention of the parties may be limited at the outset to the original promisor.[3] The benefit too, if such is the understanding of the parties to the promise, may be limited to the promisee,[4] or in England, to the promisee and subsequent occupant of the promisee's land by express assignment of the contract.[5] The analogy of the negative easement is objectionable for the further reason that easements are confined to real property, but restrictive agreements apply equally to personal property.[6]

Nor is the doctrine of restrictive agreements illuminated by the suggested analogy to the doctrine of Spencer's Case. Upon covenants running with the land assignees are bound, without regard to notice, or absence of value, whereas notice, or the absence of value, is the very foundation of the subsequent possessor's liability on restrictive agreements. Nor does the doctrine of Spencer's Case apply to personal property.

In truth, the passing of the benefit and burden of restrictive agreements is not to be explained by any single analogy or principle. The imposition of the burden upon others than the promisor and the acquisition of the benefit by others than the promisee are the results of two very different principles.

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[1] Brewer *v.* Marshall, 19 N. J. Eq. 537, 543; DeGray *v.* Monmouth Co., 50 N. J. Eq. 329, 339.

[2] Gale, Easements (74) 10; Formby *v.* Barker, [1903] 2 Ch. 539.

[3] *Re* Fawcett, 42 Ch. D. 150.

[4] *Supra*, 179 and *n.* 6.

[5] *Supra*, 179, 180 *n.* 1.

[6] *Supra*, 181.

The burden is imposed upon a subsequent possessor of the *res*, whether real or personal, upon the same principle that the grantee of a guilty trustee, or the grantee of one already under contract to sell the *res* to another, is bound to convey the *res* to the *cestui que trust* or prior buyer. In all three cases there would be the like injustice, if the purchaser with notice, or the volunteer, were allowed to profit at the expense of the *cestui que trust* or promisee by ignoring the trust, the promise to convey, or the restrictive agreement. Equity, therefore, in all three cases imposes upon the grantee a constructive duty coextensive with the express duty of his grantor.

The right of third persons to the benefit of restrictive agreements is the result of the equally just and equally simple principle, that equity will compel the promisor to perform his agreement according to its tenor. If the restrictive agreement, fairly interpreted, was intended for the sole benefit of the promisee, only he can enforce it. If on the other hand it was intended for the benefit of the occupant or occupants of adjoining lands, then such occupant or occupants may compel its specific performance. It is to be observed that a grantee of the promisee acquires his rights not as assignee of the restrictive contract, but as assignee of the promisee's land. Accordingly the assignee of the land is none the less entitled to the benefit of the agreement, although there was no assignment of the contract,[1] or even although he was ignorant of its existence when he acquired the land.[2] The assignee's situation in this respect is closely analogous to the rights of the buyer of land from one to whom it had been previously sold with warranty. The last buyer enforces the warranty of the first seller not as assignee of the warranty, but as assignee of the land, for that is the meaning of the warrantor's undertaking. The analogy between the restrictive agreement and a warranty holds also in other respects. As the assignee of the land may sue upon the warranty in his own name without joining the warrantee,[3] so the subsequent possessor of the neighboring land may, as sole plaintiff, file his bill for an injunction against the promisor.[4] A warrantee,

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[1] Peck *v.* Conway, 119 Mass. 546; Phœnix Co. *v.* Continental Co., 87 N. Y. 400, 408.

[2] Rogers *v.* Hosegood, [1900] 2 Ch. 388, 406.

[3] Wyman *v.* Ballard, 12 Mass. 304; Withy *v.* Mumford, 5 Cow. 137; Wilson *v.* Taylor, 9 Oh. St. 595. See also Noke *v.* Awder, Cro. El. 373, 486; Lewis *v.* Campbell, 8 Taunt. 715.

[4] Western *v.* Macdermott, 2 Ch. App. 72.

who has conveyed the land to another, can no longer enforce the warranty;[1] in like manner a promisee who has parted with all of his land in the neighborhood loses the right to enforce the restrictive agreement.[2] A release of the warranty by the warrantee after his conveyance to another is inoperative;[3] a release of the restrictive agreement by the promisee after parting with his land in the neighborhood is likewise of no effect as to the land conveyed by him.[4] A *bona fide* purchaser from the warrantee acquires the warranty free from any equitable defenses good against the warrantee;[5] it is believed that an innocent purchaser from the promisee should be allowed to enforce performance of a restrictive agreement, although the promisors might have defeated a suit by the promisee on the ground of fraud or by reason of some other equitable defense. But no case has been found involving this question.

These qualities, common to the warranty and the restrictive agreement, indicate that they both belong in the same class with bills and notes. For the holder of a bill or note sues in his own name, acquires his right, not as assignee of a *chose in action*, but as the *persona designata* within the tenor of the instrument, and, if a *bona fide* purchaser, holds free from equities and equitable defenses. If the right to enforce restrictive agreements were limited to assignees of the land, in privity of estate with the promisees, they, like assignees of a warranty, would be assimilated to indorsees of a bill or note payable to order. The restrictive agreement, however, is frequently intended to enure to the benefit of any possessor subsequent to the promisee,[6] or even to one who acquired the promisee's land before the making of the prom-

[1] Keith *v.* Day, 15 Vt. 660; Smith *v.* Perry, 26 Vt. 279. If the warrantee gave an independent warranty to his vendee he may sue the original warrantor after indemnifying his own vendee, but not otherwise. Green *v.* Jones, 6 M. & W. 656; Wheeler *v.* Sohier, 3 Cush. 219; Markland *v.* Crump, 1 Dev. & B. 94.

[2] Dana *v.* Wentworth, 111 Mass. 291; Keates *v.* Lyon, 4 Ch. 218; Trustees *v.* Lynch, 70 N. Y. 440, 451; Barron *v.* Richard, 3 Edw. Ch. 96, 101.

[3] Littlefield *v.* Getchell, 32 Me. 390 (*semble*); Chase *v.* Weston, 12 N. H. 413. See also Harper *v.* Bird, T. Jones, 102. The *dictum contra* in Middlemore *v.* Goodale, Cro. Car. 503, may be disregarded.

[4] Eastwood *v.* Lever, 4 D. J. & S. 114, 126; Western *v.* Macdermott, L. R. 1 Eq. 499, 506; Rowell *v.* Satchell, [1903] 2 Ch. 212; Hopkins *v.* Smith, 162 Mass. 444; Coudert *v.* Sayre, 46 N. J. Eq. 386, 396; Hills *v.* Miller, 3 Paige 254.

[5] Ill. Co. *v.* Bonner, 91 Ill. 114; Hunt *v.* Owing, 17 B. Mon. 73; Alexander *v.* Schreiber, 13 Mo. 271; Suydam *v.* Jones, 10 Wend. 180; Greenvault *v.* Davis, 4 Hill 643; Kellogg *v.* Wood, 4 Paige 578, 616.

[6] *Supra*, 178, 179.

ise.[1] In such cases the true analogue of the restrictive agreement is the note payable to bearer. The principle is clearly stated by Emott, J., in Brouwer *v.* Jones,[2] in which case a prior grantee of one part of a tract of land was allowed to enforce the restrictive covenant of a later grantee of another part of the same tract: "I am unable to see in what respect the relative dates of the conveyances of Brouwer and Mason [the common grantors] can make any difference. Every such covenant, in every deed given by them, was intended not only for their benefit but also for that of all their prior as well as subsequent grantees. . . . This court may, therefore, very properly be asked to interpose in behalf of any of the owners of the lots, as being parties for whose benefit the covenants were made."

J. B. Ames.

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[1] *Supra*, 179 and *n.* 4.

[2] 23 Barb. 153, 162. See the similar statement of Chancellor Walworth in Barrow *v.* Richard, 8 Paige 351.